DECISION THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-209349 **DATE:** April 9, 1984

MATTER OF: Georgia and Leonie Mallory

DIGEST:

Two Department of Army employees were erroneously separated from permanent full-time positions and later reinstated with backpay under 5 U.S.C. § 5596 in intermittent positions as ordered by Merit Systems Protection Board. The Agency properly deducted from the employees' backpay awards the amounts which they had received as severance pay. Furthermore, they are not entitled to severance pay incident to their subsequent separations from the intermittent positions since severance pay entitlement only extends to employees with regularly prescheduled tours of duty.

The matter presented concerns the severance pay entitlement of two employees who were twice separated from their positions with the Department of the Army.[1] Initially they were separated from their permanent full-time positions in a reduction in force. Pursuant to a decision in their favor by the Merit Systems Protection Board they were retroactively reinstated without a break in service in intermittent positions. Subsequently they were separated by reduction-in-force procedures from these intermittent positions. Retroactive restoration of the employees to duty without a break in service as intermittent employees terminated their right to severance pay in connection with their original separations from their full-time positions and they are not entitled to severance pay as a result of subsequent involuntary separation from their intermittent positions.

---

[1]This matter is presented by Major Barry G. Poole, Finance and Accounting officer, Headquarters, 101st Airborne Division (Air Assault) and Fort Campbell, Fort Campbell, Kentucky.

FACTS

Georgia R. Mallory and Leonie G. Mallory were employed as Pressers, grade WG-2 in the Laundry and Dry Cleaning Facility at Fort Campbell, Kentucky. The Mallorys were separated from their permanent full-time positions as Pressers, effective May 30, 1979, as a result of a reduction in force. As a result of their involuntary separations they received severance pay under 5 U.S.C. § 5595. Georgia Mallory received biweekly severance payments in the total amount of $3,839.01 during the period from May 31 to October 6, 1979, and Leonie Mallory received $8,348.63 in severance pay during the period May 31, 1979, to March 8, 1980.

The Mallorys appealed their separation of May 30, 1979, to the Atlanta Field Office of the Merit Systems Protection Board (Board). In his decision of October 15, 1979, the presiding official found that under then-applicable reduction-in-force procedures the Army had been obligated to offer the Mallorys intermittent WG-2 Presser positions in a separate competitive level prior to separating them. Since the Army had not done so, the Mallorys' separations were found to have been erroneous and the presiding official recommended that they be reinstated in intermittent WG-2 positions retroactive to the effective date of their separations. The Agency appealed and the Merit Systems Protection Board, by final order dated August 22, 1980, affirmed the Field Office's decision. Subsequently the Mallorys petitioned the Board's Atlanta Field Office to compel the Army to comply with the October 15, 1979 decision as affirmed by the August 22, 1980 order. By an addendum decision dated April 23, 1982, the Board ordered the Army to place the Mallorys in intermittent grade WG-2 or equivalent positions and to pay them backpay retroactive to May 30, 1979, the date of their separations in the reduction in force. On May 3, 1982, the Agency cancelled the May 30, 1979 separations and retroactively placed the Mallorys in positions as intermittent Pressers, grade WG-2, effective May 31, 1979.

Incident to their retroactive appointments to intermittent positions as Pressers, grade WG-2, the Mallorys received backpay under the Back Pay Act, 5 U.S.C. § 5596. Subsequent to their erroneous separations on May 30, 1979,

and prior to the May 3, 1982 action retroactively reemploying them in intermittent positions the Mallorys had been employed at times by the Agency as Pressers on a temporary basis. Georgia had apparently been employed as a temporary employee by the Agency during the period April 24, 1980, through December 7, 1980, and from December 8, 1981, to May 1982. Leonie had apparently been employed by the Agency on a temporary basis from December 8, 1981, to May 1982. These periods during which the Mallorys had been temporarily employed by the Army were excluded for the purpose of determining their entitlement to backpay. Also excluded for the purpose of determining their backpay entitlement was the period from December 8, 1980, through December 7, 1981, during which the laundry and drycleaning operations were contracted out to a private firm. The Agency deducted from the amount of backpay due the amounts which the Mallorys had received as severance pay. After further deductions for FICA and income tax withholding Georgia and Leonie Mallory respectively received the amounts of $2,101.83 and $2,975.45 as backpay.

The Mallorys' intermittent appointments as Pressers, grade WG-2, were terminated in August 1982 in another reduction-in-force action. They did not receive any severance pay as a result of these separations.

ANALYSIS

The Army deducted the severance pay they had earlier received from the Mallorys' backpay awards since it believed that the Board's decision canceling their May 30, 1979 separations and ordering their retroactive placement in intermittent positions without a break in service terminated their entitlement to severance pay. Furthermore, the Army believes that since severance pay is applicable only to full-time and part-time employees with regular tours of duty the Mallorys are not entitled to severance pay as a result of involuntary separation from their intermittent positions, either in August of 1982 or on December 8, 1980, when the laundry and drycleaning operations were contracted out.

The Mallorys, through their attorney, contend that they were reinstated to intermittent positions under temporary appointments and that reemployment on this basis served only to defer their severance pay entitlement until expiration of

the temporary appointments. They also take exception to the Agency's view that they were not entitled to severance pay upon involuntary separation from the intermittent positions.

Under 5 U.S.C. § 5595 an otherwise qualified employee who has been employed currently for a continuous period of at least one year is entitled to severance pay when he is involuntarily separated from Government service not by removal for cause, on charges of misconduct, delinquency or inefficiency. Thus, at the time they were involuntarily separated from their permanent positions on May 30, 1979, the Mallorys were entitled to severance pay. However, in compliance with the Board's order the Agency cancelled the May 30 separations. As of that date the Mallorys were retroactively placed on the rolls without a break in service in intermittent positions at the same grade level and they were paid backpay for that period.

Under 5 U.S.C. § 5596(b) an individual who is found to have been affected by an unjustified or unwarranted personnel action which results in the withdrawal or reduction of all or a part of his pay is entitled to backpay upon correction of that personnel action. He is "* * * for all purposes deemed to have performed service for the agency" during the period for which he receives backpay.

In the present case the Board determined that the Mallorys were wrongfully separated on May 30, 1979, and ordered their reemployment in intermittent positions retroactive to that date. Under the backpay authority of 5 U.S.C. § 5596 they were entitled to the amounts they would have received for the period of erroneous separation if the unwarranted personnel actions had not occurred. Accordingly, their separations are regarded as never having occurred and they are deemed for all purposes to have rendered service during the period covered by the corrective personnel action. See B-178551, January 2, 1976, and B-167875, October 31, 1969.

Under 5 U.S.C. § 5595, an employee's entitlement to severance pay is conditioned upon actual separation from the service. Since the Mallorys are regarded for all purposes as having performed service during the period of wrongful separation, they may not simultaneously claim the status of

"separated" employees during the same period. Accordingly, the severance pay they received was properly deducted from their backpay. See Matter of Sargent, 57 Comp. Gen. 464 (1978), and cases cited therein.

On their behalf, the Mallorys' attorney argues that their restoration to the Agency's rolls should merely have deferred their entitlement to severance pay until they were subsequently separated on an involuntary basis. He quotes language from a Department of Defense pamphlet which essentially states that reemployment in a Federal agency with a temporary appointment of one year or less interrupts or defers severance pay until such an appointment is terminated with severance payments commencing thereafter.

Under Executive Order No. 11257, November 17, 1965, the President delegated to the Civil Service Commission (now the Office of Personnel Management) the authority to promulgate severance pay regulations implementing 5 U.S.C. § 5595. Pursuant to this authority the Office of Personnel Management has issued the regulations contained in 5 C.F.R. Part 550, subpart G. The language of the Department of Defense pamphlet referred to by the Mallorys' attorney is consistent with the regulation set forth at 5 C.F.R. § 550.707(b). That regulation is based on the specific provision of 5 U.S.C. § 5595(a)(2)(ii) applicable to certain time limited appointments. It provides in part that when, without a break or after a break in service of 3 days or less, an employee who is entitled to severance pay accepts one or more temporary part-time or temporary intermittent appointments the agency which separated him shall suspend and then continue the payment of severance pay upon termination of the temporary appointment. As used in this regulation the term "temporary" means "an appointment with a definite time limitation."

The intermittent appointments which the Mallorys received retroactive to March 30, 1979, were not temporary. We recognize that the positions to which the Mallorys were reinstated were terminated on December 7, 1980, when the laundry and drycleaning operations were contracted out and that, in retrospect, the appointments would appear to be of limited duration. Nevertheless, the intermittent positions to which they were restored were indefinite rather than time limited appointments. The Merit Systems Protection

Board found that before the Mallorys could be separated from their permanent full-time positions in the Group I retention category the Army was required, under then-applicable reduction-in-force procedures, to offer them less than full-time positions in the Group II retention category. As in effect through December 31, 1980, Subchapter 5-2 of Chapter 351 of the Federal Personnel Manual provided for competing employees to be classed in Groups I, II and III on the basis of tenure and excluded employees with time limited positions from those tenure groups. Specifically, Subchapter 4-5 provided:

> "* * * In the competitive service, employees with temporary appointments with specific time limits are not competing employees; they are released by termination of appointment."

Since the Mallorys were not reinstated to time limited or temporary positions, their severance pay entitlement is not deferred under 5 U.S.C. § 5595(a)(2)(ii) or implementing regulations or instructions issued thereunder.

The Mallorys' attorney also disputes the Army's position that his clients are not entitled to severance pay incident to their separation from the intermittent positions to which they were retroactivley appointed. In support of this view he refers to the following provision from Federal Personnel Manual Supplement 990-2, Book 550, Subch. S7-4b.

> "b. **Twelve months continuous service.** Regulation. (d) Determination of 12 months continuous service. The requirement of section 5595(b) of title 5, United States Code, is met if the employee on the date of separation has been on the rolls of one or more agencies under one or more appointments without time limitation, or temporary appointments that precede or follow an appointment without time limitation, without any break in service of more than three calendar days for at least the preceding 12 calendar months." (Section 550.704)

This provision is a restatement of part of the regulation set forth at 5 C.F.R. § 550.704(d). In itself it does not provide a basis for allowing the Mallorys severance pay. The regulation at 5 C.F.R. § 550.704(d) relates to the requirement in 5 U.S.C. § 5595(b)(1) that in order to be entitled to severance pay an employee must have been employed currently for a continuous period of at least 12 months. That is but one of the conditions of entitlement. To be entitled to severance pay an individual must also meet the other statutory requirements as implemented by regulations issued under the authority of 5 U.S.C. § 5595(b).

Entitlement to severance pay only applies to employees involuntarily separated from positions with "* * * a regularly prescheduled tour of duty." 5 C.F.R. § 550.701(b) and Federal Personnel Manual Chapter 550, Subch. 7-3b. Intermittent service is nonfull-time service without a prescheduled regular tour of duty. See Federal Personnel Manual Supplement 296-31, Appendix B, Subchapter S210-4d. Since actual intermittent employment excludes "a regularly prescheduled tour of duty" intermittent employees are not entitled to severance pay even when involuntarily separated from such employment. Thus, the Mallorys are not entitled to the payment of severance pay incident to their involuntary separation from their intermittent positions.

In addition to the deduction of the amounts paid as severance pay the Mallorys' attorney objects to the fact that the Federal income tax was withheld in one lump sum from the backpay award paid to the Mallorys in 1982. Furthermore, he objects to the Agency's deductions under the Federal Insurance Contributions Act (FICA) from the amounts that had originally been paid as severance pay. The Agency advises that the income taxes and FICA were withheld in accordance with the applicable Army regulations.

The withholding of Federal taxes from wages is primarily a matter reserved for determination by the Department of the Treasury, Internal Revenue Service and is generally not within our jurisdiction. See 26 U.S.C. § 3102, 3402, 6202, 6302. Regarding the withholding of income tax the courts have held that a judgment against an employer representing an award of backpay or other

compensation for services is taxable income subject to withholding. See Keen v. Mid-Continent Petroleum Corp. 63 F. Supp. 120 (N.D. Iowa 1945), aff'd 157 F.2d 310 (8th Cir. 1946); Freeman v. Blake Co., 84 F. Supp. 700 (D. Mass. 1949); Smith v. Kingsport Press, Inc., 263 F. Supp. 771 (E.D. Tenn. 1966). Also, see Rev. Rul. 57-55, 1957-1 C.B. 304. Concerning the FICA deductions from the amounts which the Mallorys had originally received as severance pay, such deductions would appear to have been proper where the Mallorys became subject to FICA withholding as a result of their reemployment in the intermittent positions effective May 31, 1979. See Ainsworth v. United States, 399 F.2d 176, 185 (1968).

Milton J. Socolar

for Comptroller General
of the United States